FILE COPY

DEC 5 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

PERLIE P. FALLON,
Counsel.

INDEX.

Subject Index.

	Page
The opinions below	1
The jurisdiction	2
The statutes involved	2
The claim	2
The respondent's objections	3
The issues presented	5
The statement of the case	5
The specification of errors	8
The summary of the argument	9
The argument	12

Part I: The Covenant to Build.

Independent covenants are allowable debts under Sec. 63 (a) (4)	12
The authorities	12
In re Schulte-United, Inc., Tipton v. Irving Trust Co., distinguished (Note 1)	13
The analysis of the lease	14
Bankruptcy is a breach of an executory contract	15
The property is located at Lincoln, Nebraska	16
The Nebraska Courts had established a measure of damage	16
Cases in other States	16
Argument of the point that the claim has no value	16
The building was to be erected by 1942	16
The United covenanted to keep and deliver the building in repair	17
The United was out of possession when the issue of damages arose	18
The English rule	19
Since the building was to be two stories greater there was a difference in rental value	19
The respondents admit such a claim was reserved	19

Page

It had accrued and was not lost by surrender 20
It was not merged in the surrender because of the twenty-seventh clause and it was reserved 21
The claim was filed in the bankruptcy and was pending undetermined when the United removed its assets 24
Sec. 77B (b) (10) makes claims upon executory contracts allowable debts 24

PART II: THE CLAIM FOR THE BREACH OF THE LEASE.

The nature of the proof made 24
The lease 25
The adjudication of the United and appointment of a trustee which qualified 25
The rejection 25
The nature of rejection (Note 2) 27
The United filed the petition under Sec. 77B while the bankruptcy was pending 27
The injury and the nature of "injury" 28
A surrender in a proceeding pending prior did not defeat the claim 29
The Congressional purpose as shown by the prior law and circumstances 29
The prior law stated (Note 3) 30
The nature of the English rule 30
The English statute stated (Note 4) 30
Sec. 77B (b) (10) stops the rent and thereby terminates the lease 30
The extent of this rule in the States (Note 5) 32
"Surrender of the Premises" is interpreted in the light of the whole section and means a return of the property 32
The claim remaining is one for damages and not for rent 33
The distinction between rent and damages stated—The Morgan Agreement—(Note 6) 33
The legislative history shows that the claim is one for damage (Note 7) 33

Page

The section is made retroactive to rejections and injuries in proceedings pending prior by express direction and the United's acceptance by adoption 34
The words "in a proceeding pending prior" were disregarded below 35
The knowledge and circumstances under which Congress acted 35
The surrender agreement had been obtained upon the express recital that the United was insolvent and had surrendered its assets 35
The assets were restored 35
Historically a debtor had not been allowed to shift from one proceeding to another and avoid creditors and recapture its assets (Note 8) 36
Sec. 77B (b) (6) was adequate for termination of current leases and the words in (b) (10) are additional and apply to petitioner 36
The legislative history shows that when the section was made available to adjudicated bankrupts all reference to limitations by surrender and reentry were dropped 37
The United by accepting the section to obtain its benefits adopted its burdens 38
The assumption of the covenants did not defeat the claim which is for damages 38
The right to prove was expressly reserved 39
The reservation 39
It applies to the whole agreement 41
It applies to "all liability of any nature with respect to the lease" and "claims xxx which may hereafter arise" 41
Reservations are always given effect 41
The surrounding circumstances show an agitation in Congress and the country for a change and legislation pending 42

Page

The reservation included legislation since the bankruptcy power is exercised by legislation alone 43
The United adopted the legislation enacted. 43
There can be no surrender apart from an express surrender (Note 9) 41
There is no limitation in the reservation except that claims will be well founded 43
The Court below held the claim was within the reservation and did not modify its position upon reargument 44
Release by construction will not serve the respondents 44
a. Under their contention there was a covenant not to sue 44
The law stated (Note 10) 44
b. The United removed its assets while petitioner was prosecuting her claims in the bankruptcy 44
The law stated (Note No. 11) 45
Respondents may not rely upon parol evidence to support a release by construction 45
Appendix A: The Statutes 46
Appendix B: The Legislative History of Section 77B 49

CITATIONS.

Cases:

American Bonding Co. v. *Pueblo Inv. Co.*, 150 F. R. 17 ..... 20, 32
Appleton v. *Marx*, 191 N. Y. 81 19
Barnett v. *Conklin*, 268 F. R. 177 ..... 42, 44
Barton Co. In re., 34 F. (2d) 517 13
Bateson v. *Gosling*, L. R. 7 Common Pleas, 9, 16, 17 44
Beal, The Thomas P., 298 F. R. 121 44
Beall v. *White*, 94 U. S. 382 41
Berkovitz v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261 43
Calhoun v. *Massie*, 253 U. S. 170 38
Carton & Co., A. B., In re., 148 F. R. 63 45
Central Trust Company v. *Chicago Auditorium*, 240 U. S. 581 ..... 9, 10, 15, 20

Cases:

	Page
Citizen's Fire, Marine and Insurance Co., The v. *Wallis*, 23 Md. 173	36
Clark v. *Bowen*, 63 U. S. (22 Howard) 270	45
Cramp & Sons Ship and Engine Building Co., Wm., v. *U. S.*, 216 U. S. 494	42
Dushane v. *Beall*, 161 U. S. 513	27
Eustis v. *Bolles*, 146 Mass. 413	38
Filene's Sons, Wm. v. *Weed*, 245 U. S. 597	9, 15
First National Bank v. *Irving Trust Co.*, 74 F. (2d) 263	13
Ford v. *Beach*, 11 Q. B. 852, 116 Eng. Reprint, 693	41
Frazin, In re., 183 F. R. 28	27
Garnett v. *Macon*, Fed. Cas., 5245, 2 Brock, 185, 10 Fed. Cases 12	44
Gifford, Ex Parte, 6 Ves. Jun. 805, 31 Reprint 1318	42
Guild v. *Sampson*, 232 Mass. 509	14
Gustin v. *Nebraska Building & Inv. Co.*, 110 Nebraska 241	10, 16, 17
Hall v. *Gould*, 13 N. Y. 127	33
Hanson v. *Newman*, (1934) 1 Ch. 298	18
Hardy v. *Fothergill*, L. R. 13 App. Cases 351	19, 30
Harrison v. *Fartlage*, 161 U. S. 57	40
Hodgkins v. *Price*, 137 Mass. 13	14
Irving Trust Co. v. *Perry*, 293 U. S. 307	3, 9, 13
Jackson v. *Stackhouse*, 1 Cowan 122	44
Joyner v. *Weeks*, L. R. 2, Q. B. D., 1891, 31	19
Kanter v. *Amsterdam Casualty Co.*, 195 A. D. 756, 187 N. Y. S. 544, 233 N. Y. 602	16, 22
Klebe v. *United States*, 263 U. S. 188	41
Knoxville Water Co. v. *Knoxville*, 189 U. S. 434	38
Kottler v. *New York Bargain House, Inc.*, 242 N. Y. 28	32, 33, 41
Lesser v. *Gray*, 236 U. S. 70	43
Llynvi Coal & Iron Co., In re Hyde, (1871) L. R. 7 Ch. App. 28	28
Male v. *Lafferty*, 105 F. R. 564	42
Manhattan Properties, Inc. v. *Irving Trust Co.*, 291 U. S. 320	30
Marshalls Garage, In re., 63 F. (2d) 759	12, 13
Maynard v. *Elliott*, 283 U. S. 273	9, 15

Cases: Page

McGregor v. *Board of Education of the City of N. Y.*, 107 N. Y. 511 20
Memphis v. *Brown*, 20 Wall., 289 45
Metropolitan Chain Stores, In re., 2 F. Supp., 287 13
Michaels v. *Fisher*, 169 N. Y. 381 23
Midland Coal, Coke and Iron Co., In re., 1895, 1 Ch. 267 30
Miller v. *Robertson*, 266 U. S. 243 40
Moon, Re, Ex Parte Dawes, 55 L. T. 114 45
Nautilus Steam Shipping Company, Limited, In re., Ex Parte Gibbs & Co., (1936) 1 Ch. 17 36
O'Brien v. *Illinois Surety Co.*, 203 F. R. 436 15, 17, 18, 20
Perkins, In re., 2 Ch. 182, (1898) 41, 42
Prudence Co. v. *Fidelity & Deposit Co. of Maryland et al.*, 297 U. S. 198 19
Ranson v. *Geer*, 20 Blatchford 535 45
Rich v. *Lord*, 18 Pick. 322 40
Richmond v. *Savil*, 1926, 2, K. B. 530 20
Rock v. *Monarch Bdg. Co.*, 87 Ohio State 244 ..... 15, 16, 17, 18, 20
Roe v. *Conway*, 74 N. Y. 201 20
Roehm v. *Horst*, 178 U. S. 1 ..... 9, 15
Roth v. *Appel*, 181 F. R. 667 30
Saint Louis, I. M. P. S. Ry. Co. v. *Clark*, 51 F. R. 483 45
Schulte-United Inc., In re., 2 F. Supp., 285 13
Scott v. *Haverstraw, Clay and Brick Co.*, 135 N. Y. 141 14
Sherwoods, In re., 210 F. R. 754 ..... 20, 32
Shubert v. *Rosenberger*, 204 F. R. 934 45
Smith v. *Gordon*, 22 Fed. Cas. 554 27
Stephenson, Ex Parte, The Official Receiver, In re., 20 Q. B. 540, (1888) 36
Stogop Realty Co., Inc. v. *National Surety Co.*, 212 A. D. 129, 207 N. Y. S. 785, 243 N. Y. 622 ..... 15, 16, 21
Tipton et al. v. *Irving Trust Co.*, 74 F. (2d) 45, 295 U. S. 747 13
Towle v. *Pullen*, 238 F. R. 107 ..... 9, 14
Trust Co. of Georgia v. *Whitehall Holding Co.*, 53 F. (2d) 635 12
Turner v. *Brown*, 3 Common Bench 157, 135 Reprint 63 (1846) 36, 45
United States v. *Pusey*, 27 Fed. Cas. 631 38

Cases:

Page

Watriss v. *Cambridge National Bank*, 130 Mass. 343 19
Watson v. *Merrill*, 136 F. R. 359 35
Wentworth v. *Manhattan Market Co.*, 218 Mass. 91 18
Winston-Salem Masonic Temple Co. v. *Irving Trust Co.*, 69 F. (2d) 484 13
Woolworth Co., F. W. v. *Petersen*, 78 F. (2d) 47 40

Statutes:

Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 562:
Sec. 12-(e) (U. S. C., Title 11, Sec. 30) 36, 48
Sec. 63 (U. S. C., Title 11, Sec. 103) 48
Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 563, as amended June 7, 1934, C. 424, 48 Stat. 912, as amended Aug. 20, 1935, C. 577, 49 Stat. 664, Aug. 29, 1935, C. 809, 49 Stat. 965:
Sec. 77A (U. S. C. App., Title 11, Sec. 206) 43, 46
Sec. 77B-(b)-(10) (U. S. C. App., Title 11, Sec. 207) 2, 3, 4, 5, 7, 8, 11, 12, 24, 25, 27, 28, 29, 30, 34, 36, 37, 39, 43, 46
Sec. 77B-(i) (U. S. C. App., Title 11, Sec. 207) 36, 47
Sec. 77B-(o) and (p) (U. S. C. App., Title 11, Sec. 207) 47
Bankruptcy Act, 1914, Sec. 54 (The Complete Statutes of England, vol. I page 655) 28, 30
Compiled Statutes of Nebraska, 1929:
Ch. 76, Art. 1, Sec. 109 40, 48

Miscellaneous:

Charles Warren: Bankruptcy in U. S. History 29
U. S. Judiciary Committee, House, Hearings 73rd Cong. 1-2 Sess. Miscellaneous 35, 36, 50, 51, 52, 53
U. S. Judiciary Committee, Senate, Hearings, 72nd Cong. 1st Sess. Uniform System of Bankruptcy, Parts 1-4 49
Williston: Contracts, Sec. 1823 44

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The Special Master's certificate is found at R. 157, fol. 242.

There was no opinion in the District Court.

The opinions in the Circuit Court of Appeals are reported in 83 F. (2d) 207. They are found R. 180, fol. 286.

Jurisdiction.

The petition for rehearing was denied on May 21, 1936. The petition for the writ of certiorari was filed July 1, 1936. The writ was granted October 26, 1936. The jurisdiction of this Court is invoked under Section 240-(a) of the Judicial Code, and Sec. 25-(c) of the Bankruptcy Act.

Statutes Involved.

The statutes are in Appendix A at page 46.

The Claim.

The petitioner is presenting a claim, comprising two items, for allowance in reorganization proceedings under Sec. 77B of the Bankruptcy Act. The items are:

(1) Damages for breach of a covenant to remove the existing building and to construct a new building upon the premises. (R. 3, fol. 5). This claim is asserted under Sec. 63 (a) (4), on the ground that the covenant was independent, and an allowable debt under the decision in *Irving Trust Co.* v. *Perry*, 293 U. S. 307. This claim is also asserted under Section 77B (b) (10) which makes executory contracts allowable debts and the United's voluntary adoption of that statute for purposes of reorganization.

(2) Damages for breach of the lease by rejection. ("Fifth", R. 4, fol. 6). This claim is asserted under Sec. 77B (b) (10) and the United's voluntary adoption of that statute for the purpose of reorganization. The statute relied upon says that where a lease was rejected in a bankruptcy proceeding pending prior to the reorganization that the damages sustained will be an allowable claim in the reorganization proceeding.

The Respondents' Objections.

The respondents have relied upon many various objections and have changed the grounds from time to time. The nature and history of the objections are as follows:

The objections to the claim on the covenant to build are these:

(1) It was not allowable under Sec. 63 (a) (4) because it was future rent.

(2) The damages can only be nominal because of the remote date of the reversion.

The first of these objections was sustained by a majority of the lower court. The second was sustained by one judge. The objections present an issue as to the scope of the decision in *Irving Trust Co.* v. *Perry,* 293 U. S. 307, and the reconciliation of the rule of the Second Circuit that such claims have no value with the rule of other Circuits and the weight of authority in the states, including Nebraska, the locus in quo, all of which is contrary.

The objections to the claim for damages for breach of the lease are these:

1. Taking Sec. 77B as it reads, the claim is not allowable, because the lease was not rejected by the trustee in bankruptcy.

This objection was not sustained. The Circuit Court of Appeals held "the claim was ostensibly within the statute" (R. 182, fol. 287). If renewed here it presents an issue as to the meaning of "rejection" as used in Sec. 77B.

(2) A group of objections relating to the meaning of Sec. 77B (b) (10) with respect to proceedings in bankruptcy pending prior are these:

(a) The obligation of the lease was terminated by surrender in the bankruptcy.

(b) Debts allowable under Sec. 77B are solely those enforcible by action in the state courts.

(c) Sec. 77B does not create new rights in lessors or create remedies upon rights already lost.

(d) "Injury" as used in Sec. 77B (b) (10) means solely damages recoverable when the section became law on June 7, 1934.

These objections were sustained by the lower court with one of the judges dissenting. They present an issue as to whether Sec. 77B (b) (10) creates a retroactive remedy with respect to leases rejected in a bankruptcy proceeding pending prior in view of the United's acceptance of that statute. There is an express reference in the section to a proceeding pending prior.

(3) That under the Twentieth clause of the lease the surrender of the premises, subleases and insurance policies was liquidated damages.

This objection was overruled by the court below with one judge dissenting. It presents an issue of interpretation of Sec. 77B (b) (10) in reference to another clause of the lease namely the Twenty-Seventh, which makes all remedies cumulative and reserves "any remedy otherwise allowed by law."

(4) That the claim was barred by release.

This objection was overruled by the lower court. If urged here it presents an issue as to whether Sec. 77B

(b) (10) relates back to a reservation which was expressly made.

The Issues Presented.

(1) Whether an independent covenant to construct a building upon leased premises, for breach of which the applicable state law had established a measure of damage, was a provable debt under Sec. 63 (a) (4) upon August 29, 1932?

(2) Whether Sec. 77B (b) (10) has application to leases rejected and surrendered in a bankruptcy pending prior? or

(3) Whether Sec. 77B (b) (10) relates back to a reservation which the petitioner made against the bankrupt estate in the express agreement of surrender?

Since the respondents may shift to issues overruled below the petitioner will argue in this brief not only the grounds upon which the claim was expunged below but all of the objections the respondents have raised in the litigation.

Statement.

The United Cigar Stores Company of America is a corporation of New Jersey. It made a lease of real property at Lincoln, Nebraska in 1922 (R. 6) and entered into possession. The lease was for 99 years. It contained a covenant that the United would construct a four story building prior to July 1, 1942 ("Sixth", R. 10). On August 29, 1932, United, by a voluntary petition, was adjudicated bankrupt and surrendered its assets to a trustee ("3" R. 60, fol. 88). United was in default at that time as to repairs and taxes. Rent was not paid nor the lease performed by United after August 29, 1932. The trustee asked that the peti-

tioner, who was the owner of the lease, take the lease back by assignment and give a general release (R. 82, Ex. G (4), 96, Ex. "I", 109, "N (6)"). This was not done (R. 106 Ex. "L"). The trustee obtained an order authorizing it to reject the lease or, in lieu of rejection, to assign the interest of the trustee in the lease to the petitioner or her nominee which the order said was not to constitute an adoption of the lease (R. 107, 108, fol. 163). The petitioner had meantime found a tenant; the Frelem Realty Corporation, a Delaware corporation. Three agreements were then executed. They bear different dates but were delivered together on January 3, 1933 (R. 48, fol. 71 and R. 49, fol. 73).

(1) The Trustee agreed with the petitioner and Frelem Realty Corporation on the charge for use and occupancy with a covenant that the lease had been disaffirmed (Ex. "Q" R. 126, fol. 191).

(2) The petitioner agreed with Frelem Realty Corporation on modifications of the lease reducing the term, the rent, and eliminating the covenant to build. This agreement was made contingent on the following assignment by United (Ex. "R", R. 127, fol. 194, 195; Ex. "P", R. 122, fol. 187):

(3) The petitioner, the trustee and United made an agreement by which the United assigned the lease to Frelem, and the petitioner assumed the covenants of the lease. There was a release clause in this agreement, a printed form, which referred to "all liability of any nature with respect to the Lease" (R. 62, fol. 90), "all claims on the part of the Landlord in respect of rent" (R. 62, fol. 90), and "all losses, claims or demands of any nature * * * which may hereafter arise out of

or in connection with the Lease" (R. 62, fol. 91). The petitioner made a reservation against all of these by annexing a typewritten Rider as follows:

Rider.

> "Nothing in this Article Fourth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. * * *"

The petitioner filed a claim in the bankruptcy proceedings for repairs, taxes and breach of the covenant to build (R. 133, fol. 203). The Trustee filed objections which were heard and remained undetermined before the Referee in Bankruptcy (R. 52, fol. 76). The United was not discharged in bankruptcy (R. 54, fol. 80).

On June 9, 1934 the United filed a petition under 77B which was allowed and the assets then in possession of a trustee in bankruptcy were turned over to a trustee for the United in the reorganization (R. 55, fol. 80). The petitioner filed a claim in the reorganization proceedings under Sec. 77B for the repairs, taxes, breach of the covenant to build and for actual damages not exceeding the rent for three years flowing from rejection of the lease by the trustee in bankruptcy in the prior proceeding (R. 2, fols. 3 to 9). The claim was allowed as to taxes and repairs but was disallowed as to breach of the covenant to build and damages flowing from the rejection.

The Specification of Errors.

The Circuit Court of Appeals erred in holding that:

1. An independent covenant in a lease is not a provable claim under Sec. 63 as it read on August 29, 1932, and a claim pending in bankruptcy proceedings did not become allowable under Sec. 77B when that section was made operative.

2. Sec. 77B does not contemplate a bankruptcy pending prior and the return of the assets in determining allowable claims for damages to a lessor by bankruptcy in a proceeding pending prior.

3. Sec. 77B (b) (10) did not use the term "surrender of the premises" in the sense of an accepted surrender or act of the trustee in the process of rejection.

4. The Bankruptcy Act does not contemplate a rejection when the trustee does not adopt a lease as an asset of the estate, repeatedly asserts it must be taken back, obtains an order for that purpose, repeatedly requires the petitioner to certify it was disaffirmed and joins in an agreement by which the lessee assigns it to a third party.

5. In affirming the order of the District Court.

These specifications are found at page 6 of the petition for the writ. The assignments of error below are found R. 170, fol. 265.

A Summary of the Argument.

Part One.

The Covenant to Build.

I. Independent covenants in contracts of lease are allowable debts under Sec. 63 (a) (4); *Irving Trust Co.* v. *A. W. Perry,* 293 U. S. 307;

a. Such covenants have been held allowable for a long period of time.

II. The covenant to build was independent:

a. It was personal and separable,

b. It was separately contracted,

c. It is found among independent covenants,

d. It was unconditional:

1. Fire did not relieve from it,

2. There was a covenant that the United would keep the building in repair and deliver it in good repair.

e. *Towle* v. *Pullen,* C. C. A. 7, 238 F. R. 107; *Wm. Filene's Sons* v. *Weed,* 245 U. S. 597.

f. Reentry for cause would not defeat the covenant under the law. Furthermore, such was the contract.

III. The Bankruptcy was an anticipatory breach; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581; *Maynard* v. *Elliott,* 283 U. S. 273.

IV. The anticipatory breach created a right of action on the executory contract; *Roehm* v. *Horst,* 178 U. S.

1; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581.

V. The cost of construction as a measure of damages had been declared by the Nebraska courts; *Gustin* v. *Nebraska Building & Inv. Co.,* 110 Nebraska 241;

a. The same rule has been declared in many state courts.

VI. The point that the claim is of no value and involves only nominal damages is without foundation:

1. The petitioner held an executory contract for performance before 1942,

2. The United covenanted to keep the building in repair and deliver it in that condition,

3. The United was out of possession when the issue of damage arose,

4. The long established rule of damage when the lease has terminated is the cost of the repairs,

5. Such claims were held to have value in bankruptcy proceedings in England as early as 1888,

6. The building to be constructed was two stories greater than the existing building.

VII. The respondents admitted in their answer to the petition for the writ of certiorari that claims provable in the bankruptcy were reserved by the petitioner in the agreement dated December 16, 1932:

1. The Special Master found such was the fact,

2. The claim would have been good without such reservation,

3. This also answers the point that the claim was merged in the surrender.

PART TWO.

The Claim Based Upon the Breach of the Lease.

VIII. The proof brought the claim for the breach of the lease within Sec. 77B (b) (10). It showed:

(a) The lease had been rejected by the United's trustee while United was in bankruptcy,

(b) The rejection was in a bankruptcy proceeding pending when the United filed the petition under Sec. 77B,

(c) The petitioner was injured by the rejection.

IX. The petitioner is therefore a creditor under Sec. 77B (b) (10).

X. The surrender of the lease in a bankruptcy proceeding pending prior did not defeat the claim:

(a) Termination of the lease is the condition of the statute,

(b) The statute provides a retroactive remedy:

1. The statute expressly says "or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section,"

2. The Congress had to annul the bankruptcy to make reorganization available to the United,

3. The legislative history of the section supports the express words used in the section,

(c) The United adopted the remedy of the statute by petitioning under it,

(d) The petitioner is not the obligor and obligee upon the claim she is making as held by the lower

court because the claim is for damages and not on the lease.

XI. The reservation in the agreement preserves the right to prove.

XII. Sec. 77B (b) (10) by United's voluntary adoption retroactively catches the reservation;

(a) The court below held that the respondents could not stand upon the covenant not to sue.

(b) Parol evidence of intention must be disregarded.

THE ARGUMENT.

PART I.

The Covenant to Build.

I.

THE COVENANT TO BUILD WAS AN ALLOWABLE DEBT IN THE BANKRUPTCY WITHIN THE DECISION IN IRVING TRUST CO. V. PERRY, 293 U. S. 307,

IT WAS AN INDEPENDENT COVENANT,

IT WAS ACTIONABLE UNDER NEBRASKA LAW,

A MEASURE OF DAMAGES FOR THE BREACH HAD BEEN DECLARED BY THE NEBRASKA COURTS.

In *Irving Trust Co.* v. *A. W. Perry,* 293 U. S. 307, 311 (1934), it was written:

> "The claim is not for rent reserved or upon the lease as such, but is founded upon *an independent express contract*, and hence within the very words of sec. 63 (a) 4." (Italics supplied.)

Such covenants have for a long period prior to the decision in *Irving Trust Co.* v. *Perry* been held allowable by the lower courts in bankruptcy proceedings; *Trust Co. of Georgia, Trustee,* v. *Whitehall Holding Co.,* C. C. A. 5, 53, F. (2d) 635 (1931): *In re Marshall's*

Garage, C. C. A. 2, 63 F. (2d) 759 (1933); *Winston-Salem Masonic Temple Co.* v. *Irving Trust Co.,* C. C. A. 2, 69 F. (2d) 484 (1934); *First National Bank* v. *Irving Trust Co.,* C. C. A. 2, 74 F. (2d) 263 (1934); *In re Barton Co.* Dist. Ct. N. H. 34 F. (2d) 517 (1929); *In re Metropolitan Chain Stores,* Dist. Ct. So. Dist. of N. Y. 2 F. Supp. 287 (1932). (Note No. 1.)

The lease defines the covenant to build as a separate, personal contract of the United. The United could only release itself by depositing security for performance. Paragraph "Twenty-Fifth" says that the debtor may assign the lease and its interest "after the erection and completion of the new building required to be erected under the provisions of Article Sixth hereof * * *." It then goes on to say that, if the new building has not been erected, an assignment may be made only if the United is not in default and upon the deposit of $25,000.00 in money or securities with a specified National Bank in Lincoln and the personal covenant of the assignee to erect the building (R. 20, fol. 31).

NOTE No. 1.—The case of *In re Schulte-United, Inc.,* U. S. Dist. Ct. So. Dist. of N. Y., 2 F. Supp., 285 (1932), apparently *contra,* involved a clause in which the plans for the building were subject to the lessor's approval and therefore the whole matter rested in the lessor's control. The dictum at page 286 is that this Court in the Chicago Auditorium case held that no claims whatever could be based upon a contract which in any shape or form related to real property. This Court overruled the District Court on that point by its decision in *Irving Trust Co.* v. *Perry,* 293 U. S. 307 where it held independent covenants in contracts of lease were allowable debts under Sec. 63 (a) (4). *Tipton et al.* v. *Irving Trust Co.,* 74 F. (2d) 45, 295 U. S. 747 was distinguished on the petition for the writ at page 12, on the ground that the covenant was not independent.

The lessor contracted not only for rent but for the United's covenants:

> "The lessor in consideration of the rents hereinafter reserved *and of the covenants and agreements of the lessee hereinafter set forth* * * *." (Italics supplied.) (R. 6, fol. 9.)

The stipulated rentals are set out in paragraph "Fourth" and are to be paid in gold coin (R. 8, fol. 12); *Scott* v. *Haverstraw Clay and Brick Co.*, 135 N. Y. 141, 146 (1892).

The independent covenants are set out separately. Paragraph "Fifth" covers taxes, which has long been adjudicated as independent, *Hodgkins* v. *Price,* 137 Mass. 13, 19 (1884); following it is "Sixth", the covenant to build, also long recognized in the common law as independent, *Guild* v. *Sampson,* 232 Mass. 509, 513 (1919). Intention may be construed from position.

The covenant is unconditional. We have seen that an assignment could not defeat it. The United was to insure the building in the lessee's name ("Tenth", R. 12, fol. 18). Destruction by fire would not relieve the United of the obligation; in such an event it must rebuild ("Eleventh", R. 13, fol. 19); in the event of fire at the very end of the term the lessor contracted for the insurance moneys on the new building ("Eleventh", R. 14, fol. 20).

The United was obligated to keep the new building in good repair at all times and to deliver it in good repair at the end of the term ("Fifteenth", R. 15, fol. 22).

Towle v. *Pullen,* C. C. A. 7, 238 F. R. 107, 110 (1916):

> "The payment of rent was an obligation which the lessees assumed entirely separate and distinct from their obligation to build the three story building referred to in the lease."

Wm. Filene's Sons Co. v. *Weed,* 245 U. S. 598, 601 (1918):

> "* * * On the face of the lease and the figures it was dealt with as a separate item * * *."

A reentry for cause would not have defeated the lessor's right to enforce the covenant; *Rock* v. *Monarch Bdg. Co.,* 87 Ohio State 244, 253 (1912); *O'Brien* v. *Illinois Surety Co.,* C. C. A. 6, 203 F. R. 436, 440 (1913); *Stogop Realty Co., Inc.,* v. *National Surety Co.,* 212 A. D. 129, 131, 207 N. Y. S. 785, 786 (1925), aff. 243 N. Y. 622. Furthermore the lessor contracted for such a right. The "Twenty-Seventh" clause of the lease provides that all remedies will be cumulative (R. 22, 23, fols. 33, 34).

The covenant being independent bankruptcy was a breach; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 591 (1916); *Maynard* v. *Elliott,* 283 U. S. 273, 275 (1931). In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, it was written at page 592:

> "We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst, supra.*

An action accrued to the petitioner on the executory contract, *Rochm* v. *Horst,* 178 U. S. 1 (1899); *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, where the Court said at p. 589:

> "It is no longer open to question in this Court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promissee has the option to treat

> the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach."

The property is located at Lincoln, Nebraska (R. 6, fol. 9). In *Gustin* v. *Nebraska Building & Inv. Co.*, 110 Nebraska 241, (1923) the state Court laid down a measure of damage, namely, the cost of construction, as follows (p. 244):

> "It was the duty of appellants to keep the building in repair, so that on the termination of the lease the building should be worth at least what it cost. Under such circumstances the measure of damages is the cost of construction, 24 Cyc. 1109; (1) Tiffany, Landlord and Tenant, Sec. 117; 2 Underhill, Landlord & Tenant, Sec. 542; Barnhart v. Boyce, 102 Ill. App. 172. And some Courts adopt the measure as the present worth of the cost of construction; that is, such a sum as will, at the legal rate of interest, produce the full cost of the building at the end of the term. Wentworth v. Manhattan, 218 Mass. 91."

The same rule of damage was established in identical cases: *Rock* v. *Monarch Bdg. Co.*, 87 Ohio State 244 (1912); *Kanter* v. *Amsterdam Casualty Co.*, 195 A. D. 756, 187 N. Y. S. 544 (1921), affirmed 233 N. Y. 602; *Stogop Realty Co.* v. *National Surety Co.*, 212 App. Div. 129, 207 N. Y. S. 785 (1925), 216 A. D. 198, 215 N. Y. S. 90 (1926), affirmed 243 N. Y. 622.

The point that the claim is of no value and involves only nominal damages is without foundation.

(1) The petitioner was entitled to have the new building upon the premises in 1942. Up to that time she had an executory contract. After that time she either had the building erected or had a cause of action

which she was obliged to promptly enforce under the law and the statute of limitations. She did not contract to wait until 2021. The Courts long ago explained that the time for performance is fixed in building contracts which extend beyond mortal life so the parties may enforce the contract during their lives; *Rock* v. *Monarch Bdg. Co.*, 87 Ohio State 244, 252 (1912); *Gustin* v. *Nebraska Bdg. & Inv. Co.*, 110 Nebraska 241, 245 (1923).

(2) The United contracted to keep the building in repair and deliver it in repair "Fifteenth" (R. 15, fol. 22).

Even where there is no covenant to keep the building in repair or insure it the courts have repelled the suggestion that the claim is of no value. The exact point was raised in *O'Brien* v. *Illinois Surety Co.*, C. C. A. 6, 203 F. R. 436 (1913). The Court stated the contention as follows (p. 438):

> "Defendant urged * * * that the lessor's sole measure of damages for its nonerection was the lessened value of the reversion falling in at the end of the stated term, which expectant diminution must be reduced to terms of present worth; and that with a 97 year lease and a building of the character described, *and without covenant to insure or to keep in repair*, such damage was so speculative as to be incapable of computation; * * *." (Italics supplied.)

The court in disposing of the contention said at page 439:

> "* * * The lease was not for an unalterable term of 97 years. It carried the seeds of an earlier ending, and when these seeds developed into cancellation, in March 1909, the term was ended. * * *

> it was necessarily within the contemplation of the parties that a reversion might occur and the building might become the property of the landlord at that earlier date, as well as at the end of the 97 years.
>
> "* * * In a case like the present, and so far as concerns the lessee's completed defaults, the speculative difficulty disappears when the lease ends."

The court then went on to hold that since there was no covenant to repair or insure or to return the building in good repair, as there are in the case at bar, that the damages must be limited to what the building would be worth as security.

(3) The United was out of possession at the time the claim was filed in the bankruptcy and the issue of damage arose. The United alleges here that the lease was surrendered in January 1933. There is no basis therefore for any claim in the computation of damages for a right to use the building after January 1933: *Rock* v. *Monarch Building Co.*, 87 Ohio State 244, (1912); *O'Brien* v. *Illinois Surety Co.*, C. C. A. 6, 203 F. R. 436, 439, (1913); *Hanson* v. *Newman* (1934) 1 Ch. 298.

Where the lessee is still in possession and the action for the breach of the covenant the length of the term is considered. *Wentworth* v. *Manhattan Market Co.*, 218 Mass. 91 (1914). This point was clearly brought out in *O'Brien* v. *Illinois Surety Co.*, C. C. A. 6, 203 F. R. 436 (1913) where the plaintiff first demanded performance and sued for the breach with the lessee still in possession. Later the plaintiff cancelled the lease and reentered and amended the complaint accordingly. The Court points out at page 440 that its opinion proceeds under the amended complaint.

The established rule is that where the term has ended the cost of the repairs and improvements is the measure of damages; *Watriss* v. *Cambridge National Bank,* 130 Mass. 343, 346 (1881) where the lease was ended by surrender; *Appleton* v. *Marx,* 191 N. Y. 81, 86 (1903), which quotes from Lord Esher's opinion in *Joyner* v. *Weeks,* L. R., 2, Q. B. D., 1891, 31.

Under the English bankruptcy statute the House of Lords, in *Hardy* v. *Fothergill,* 13 App. Cases 351, (1888), passed upon a covenant to repair under a fifty year lease which was not operative until eight years in the future. Valuation was directly raised since the statute provided the claim was discharged if it was one which was capable of valuation. It was held that the claim could be valued.

The petitioner proved as a part of her case that the existing building was of two stories (R. 40, fol. 61). The building to be erected by the United was of four stories (R. 10, fol. 14). There is an apparent difference in rental value if the reversion is involved under the rule of damage laid down by this Court in *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland et al.,* 297 U. S. 198, 206, 207 (1935).

In its reply to the petition for the writ of certiorari the respondents admit that the claim on the covenant to build was reserved in the assignment agreement dated December 16, 1932. They state at the end of the last paragraph on page 5:

> "The petitioner urges that such a claim would have been allowable under Sec. 63 (a) of the Bankruptcy Act as it stood at the time of the Debtor's bankruptcy in 1932 and hence was not caught by the release in the assignment agreement of December 16, 1932, *which was qualified to except such claims.*" (Italics supplied.)

The Special Master found such a reservation. He stated (R. 157, fol. 243):

> "the claimant, to wit, on December 16, 1932, * * * merely reserved the right to file for items which were provable in the then pending bankruptcy proceeding."

Under the decision in *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581 (1915), the bankruptcy was an anticipatory breach of the executory contract to erect the building. The claim had therefore accrued and was not reached by a subsequent surrender. Surrender does not discharge accrued liabilities. *In re Sherwoods,* C. C. A. 2, 210 F. R. 754, 759, 760 (1913); *American Bonding Co.* v. *Pueblo Inv. Co.,* C. C. A. 8, 150 F. R. 17, 30, 31, (1906); *Roe* v. *Conway,* 74 N. Y. 201, 205, (1878); *McGregor* v. *Board of Education of the City of New York,* 107 N. Y. 511, 517, (1887); *Richmond* v. *Savil,* 1926, 2 K. B. 530, 51 Am. Law Reports Ann. 1053. The precise point was decided in *O'Brien* v. *Illinois Surety Co.,* C. C. A. 6, 203 F. R. 436, 440 (1913):

> "* * * The notice of proposed cancellation and reentry were not acts of rescission; they were acts of enforcement; they were pursuant to, and in execution of, the express provisions of the contract and the powers thereby conferred. * * * As to the defaults which had occurred, and to the extent of the damage which, because of such defaults, then had accrued against Nolan and the surety, they had no destructive effect."

Rock v. *Monarch Bdg. Co.,* 87 Ohio State 244, 253 (1912):

> "As to the claim that the surety was discharged by the action of the plaintiff in procuring a forfeiture of the lease and resuming possession of the land., * * * Surely it could not be assumed that

> the parties contemplated that plaintiff would withhold, for ninety-nine years, action to get rid of an insolvent lessee, one who had repudiated its contract, being unable to perform it."

Stogop Realty Co. et al. v. *National Surety Co.*, 212 App. Div. 129, 207 N. Y. S. 785 (1925), 216 App. Div. 198, 215 N. Y. S. 90 (1926) affirmed, 243 N. Y. 622; The court wrote in 212 A. D. 131:

> "The lessee cannot avoid his contractual obligation to make alterations through breaching the contract. * * * But the contention that the landlord could not dispossess the tenant for nonpayment of rent, without destroying the obligation to complete the alterations is untenable. A judgment for rent would probably have been worthless. To require that the tenant be allowed to continue in possession without paying rent, unless he were to be relieved of his obligation to complete the alterations is not required by any rule of law."

The point that the claim on the covenant to build was merged in the surrender by the terms of the lease is based upon a misreading of the lease, and rides in the face of the express reservation of such claims made in the agreement dated December 16, 1932.

The point is based upon the "Twentieth" clause of the lease (R. 19). It is a security clause. It provides that if the term of the lease be ended by default that the insurance policies, insurance money in the hands of any trustee, any improvements; the rents, issues and profits accrued and to accrue, shall become the property of the lessor as liquidated damage "hereby fixed and agreed upon by parties hereto. Both parties hereto recognizing the impossibility of precisely ascertaining the amount of damages sustained * * *." The clause is but one among thirty-three clauses in the lease. The

"Sixth" clause required the United to erect the building by 1942; the "Tenth" clause required all insurance moneys, in case of fire, to be deposited with a trustee; the Twenty Fifth clause required the deposit of Twenty five thousand dollars with a trustee if the lease were assigned. The clause relied upon did not contemplate that the lessor would take the insurance policies which were of nominal value and rents accrued and to accrue which amounted to $1019.42 in settlement of a violation in the event of a non accrual of these covenants. The Twenty-seventh clause of the lease provides: (R. 22, 23, fols. 33, 34)

> "Lessee covenants that the rights and remedies of lessor under this lease shall be cumulative and no one of them shall be exclusively of any of the rights or remedies provided for in this lease *or otherwise allowed by law.*" (Italics supplied.)

The Twenty-fifth clause requires that in the event of an assignment the United must, regardless of the Twentieth clause, deposit twenty-five thousand dollars as security and post the personal covenant of the assignee to perform the building covenant.

Kanter v. *New Amsterdam Casualty Co.*, 195 A. D. 756, 187 N. Y. S. 544 affirmed, 233 N. Y. 602 (1921). App. Div. Report p. 758:

> "* * * The contention that the damages are limited to the $350 deposited by the tenant is not tenable. The lease executed by the plaintiff to the 115th Street Garage Company, Inc., contains twenty-six paragraphs embodying covenants and agreements on the part of the tenant in addition to the provisions for altering the building, and it is provided in paragraph 2, which contains those provisions, that the lease is given upon the express condition that the tenant shall make the alterations

as therein provided. The provisions with respect to the deposit of $350 by the tenant are contained in paragraph 20, and it is therein recited that $350 has been deposited by the tenant with the landlord "as security for the faithful performance of all the terms, covenants, and conditions in the said lease contained," and it is provided that if the tenant surrenders the premises, or is dispossessed, or defaults, or violates any of the terms, covenants, or conditions contained in the lease, the amount so deposited shall belong to the landlord as liquidated and stipulated damages, and it is provided that the parties have so stipulated for the reason that they cannot ascertain the exact amount of damages which the landlord would sustain in the event of any breach or violation of the lease and that the amount so deposited shall be returned to the tenant with interest at 3 per cent, per annum after the expiration of the lease. If it had been intended that the amount so deposited should be deemed the liquidated damages for the failure of the tenant to make the alterations, it is not probable that paragraph 3 of the lease would have required the giving of a bond to be executed by the defendant in the precise terms of the bond on which the action is brought, for that would be wholly inconsistent with the theory that the deposit would constitute liquidated damages for the failure of the tenant to make the alterations.

Michaels v. *Fisher*, 169 N. Y. 381, 385 (1902).

Finally the agreement upon which the respondents rely contains a reservation of a right to prove claims and it is admitted that the claim is one so reserved. That rejects entirely any contention that the parties acted under the Twentieth clause in the manner in which the respondents claim.

The petitioner duly filed her claim for the breach of the covenant to build in the bankruptcy proceedings (R. 133, fol. 203). She asked that the claim be liquidated under Sec. 63 (b) (R. 135, fol. 206). The claim was pending undetermined before the Referee in Bankruptcy when the United's petition under Sec. 77B was filed and allowed (R. 51, 52, fols. 75, 76) and the assets removed by United from the bankruptcy Court. The claim was then filed in these reorganization proceedings ("Second" R. 3, fol. 5) with a request that it be liquidated under Sec. 63 (b).

Sec. 77B (b) (10), which the United adopted as the law of these proceedings, says "creditors" shall include "claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."

PART II.

The Claim for the Breach of the Lease.

II.

THE PETITIONER'S PROOF BROUGHT THE CLAIM FOR BREACH OF THE LEASE WITHIN SEC. 77B (b) (10). SHE PROVED:

(a) THAT THE LEASE WAS REJECTED BY THE IRVING TRUST COMPANY AS TRUSTEE IN BANKRUPTCY OF THE UNITED; AND

(b) THAT THE REJECTION WAS MADE IN A PROCEEDING PENDING WHEN THE UNITED FILED THE PETITION UNDER SEC. 77B; AND

(c) THAT SHE WAS INJURED BY THE REJECTION, AND

(d) THE RENT WHICH HAD ACCRUED TO THE DATE OF SURRENDER.

THE PETITIONER IS THEREFORE A CREDITOR.

THE NATURE OF HER CLAIM IS DEFINED IN SEC. 77B (b) (10) AS ACTUAL DAMAGES IN AN AMOUNT NOT EXCEEDING A TOTAL OF THREE YEARS RENT.

The making of the lease was admitted (R. 38, fol. 58).

It was admitted that the United was adjudicated a bankrupt on August 29, 1932 and that the Irving Trust Company was elected Trustee and qualified (R. 42, fols. 63, 64).

The petitioner proved a rejection over the trustee in bankruptcy's signature. Upon December 21, 1932 the Irving Trust Company, as trustee in bankruptcy, wrote to the petitioner's attorney enclosed a certificate of disaffirmance (Ex. "O", R. 121, fol. 184). He proposed some modification in the description of the property (Ex. "P", R. 122, 124, fols. 186, 188). The certificate was executed under date of December 31, 1932 (Ex. "Q", R. 126) and reads in part as follows:

"December 31, 1932.

Irving Trust Company, as Trustee in Bankruptcy,
for United Cigar Stores Company of America,
625 Madison Avenue,
New York, N. Y.

In re Lease No. 1264—13th and O Streets, Lincoln, Nebraska.

GENTLEMEN:

The undersigned is the owner of the landlord's interest in the lease, dated May 25, 1922, of the premises situated at the northeasterly corner of 13th and O Streets, in the City of Lincoln, State of Nebraska, to the United Cigar Stores Company

of America, *which said lease has been disaffirmed by you.*

* * * * * * *

Very truly yours,
MRS. JOHN S. MEADOWS,
By WILLIAM H. SEWARD, (L. S.)
Her Attorney-in-Fact.

Accepted:
IRVING TRUST COMPANY,
As Trustee in Bankruptcy for United Cigar Stores Company of America,
BY JOSEPH T. STEARNS,
Asst. Sec'y.

Approved:
FRELEM REALTY CORPORATION,
By F. L. EMERSON,
President." (Italics supplied.)

This paper was exchanged simultaneously with the delivery of the surrender agreement dated December 16, 1932 (Tr. Ex. 1 R. 60, fol. 87) on January 3, 1933 (R. 48, fol. 71 and R. 49, fol. 73). Prior to the delivery of the certificate of disaffirmance the trustee in bankruptcy had requested on three occasions that the petitioner take the lease back and give a general release as to it and execute a new lease of a store on the premises (R. 82, 96, 109). This was refused. The trustee in bankruptcy then obtained, upon notice, an order authorizing it to reject the lease or, in lieu of rejection, to assign *the interest of the trustee* in the lease to the petitioner which the order said was not to constitute an adoption of the lease (R. 107, 108, fol. 163). The trustee did not assign any interest in the lease. The bankrupt alone assigned ("First", R. 61, fol. 89). The

agreement of surrender provided in paragraph "Fifth" (R. 63, fol. 92).

> "The landlord and the Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not effect in any manner the full force and validity of the *rejection* of the Lease by the Trustee." (Italics supplied.)

It happened that the date of the Referee's order was wrongly recited in this agreement and the parties made an amendatory agreement, inserting the proper date, upon March 31, 1933 (Tr. Ex. "2", R. 65). The trustee in bankruptcy insisted that in the amendatory agreement the petitioner reaffirm the provisions of paragraph "Fifth" of the surrender agreement which recited and confirmed the rejection by the following covenant (R. 67, fol. 98):

> Second. In all other respects the said Assignment Agreement shall remain in full force and effect.

The word "rejection" in Sec. 77B (b) (10) contemplates acts by which a trustee in bankruptcy had indicated by any action or lack of action that it did not desire to adopt a lease as an asset of the estate. (Note No. 2.)

It was admitted that on June 9, 1934 the United filed a petition under Sec. 77B, which was approved and on that date the United's assets were in the possession of

---

NOTE No. 2.—*Smith* v. *Gordon*, 22 Fed. Cas. 554, Headnote "8" (1843); *Dushane* v. *Beall*, 161 U. S. 513, 516 (1895); *In re Frazin*, C. C. A. 2, 183 F. R. 28, 32 (1910). The respondent's argument upon this point really touches upon surrender and not rejection.

the trustee in bankruptcy and the United was in the bankruptcy proceedings and had not been discharged (R. 54, fol. 80).

The petitioner proved injury resulting from the rejection by offering an agreement of lease with Frelem Realty Corporation whereby the rent was reduced $9000 per annum, the term cut to five years and the covenant to build eliminated (Ex. "R", R. 127, fol. 194).

The word "injury" as used in Sec. 77B (b) (10) was taken from the English Bankruptcy Act (The Bankruptcy Act, 1914, Sec. 54 (8); The Complete Statutes of England Vol. 1, p. 655, 658):

> "8. Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

The language used originated in Sec. 23 of The Bankruptcy Act, 1869 (32 & 33 Vict. C. 71, S23), and was long ago interpreted with respect to leases. *Llynvi Coal & Iron Co., In re Hyde* (1871), L. R. 7 Ch. App. 28, 34, 35:

> "The landlord is deprived of the benefit of the contract of the bankrupt to take a lease, or of his covenant to pay rent, and he is to prove to the extent of that injury; that is to say, so far as you can estimate them, for what the damages would be for non-performance of the contract. * * * Under Sec. 23, in estimating the amount of damages, you are to take into consideration that the landlord regains possession of the property, and if he can get as much rent for the property afterwards as before, then the damages would be *nil;* if he gets less, it will be the difference."

III.

THE SURRENDER OF THE LEASE IN THE BANKRUPTCY PROCEEDING PENDING PRIOR DID NOT DEFEAT THE CLAIM BECAUSE:

(a) THE TERMINATION OF THE LEASE IS THE CONDITION OF SEC. 77B (b) (10). AND

(b) SEC. 77B (b) (10) PROVIDES A RETROACTIVE REMEDY FOR INJURIES FROM REJECTION SUFFERED IN A BANKRUPTCY PROCEEDING PENDING PRIOR, AND

(c) THE UNITED ADOPTED THE RETROACTIVE REMEDY OF SEC. 77B (b) (10) BY PETITIONING FOR RELIEF UNDER THAT SECTION.

(d) THE PETITIONER IS NOT THE OBLIGOR AND OBLIGEE OF THE CLAIM SHE IS MAKING, AS HELD BY THE LOWER COURT, BECAUSE THE CLAIM IS FOR DAMAGES AND NOT ON THE LEASE.

We look at the general purpose of Sec. 77B. Equity receiverships in the Federal Courts had proven unsatisfactory. The Bankruptcy Act was not adapted to reorganization. It provided for the surrender of a debtor's assets, their equitable distribution among creditors, and the debtor's discharge, empty handed. The Congress made a new departure. It left the assets with the debtor. It pared down or removed the causes of the embarrassment. It left the road ahead free so the debtor might advance on it. The Congress did this in the interests of the debtor, its creditors and the public. (*Charles Warren: Bankruptcy In U. S. History*). Before Sec. 77B a bankrupt remained liable on leases;

they were not dischargeable debts. (Note No. 3.) That rule would prevent all reorganization. The debtor might still be pursued. The fundamental bankruptcy power had to be brought to bear on leases.

The Congress had before it a tested legislative chart in the English statute. (Note No. 4.) The Congress did not use the same words. Its language is, however, sufficient to terminate rejected leases. Sec. 77B (b) (10) defining the claim states that "the claim shall be

---

NOTE No. 3.—The very old case of *Roth* v. *Appel*, C. C. A. 2, 181 F. 667 (1910), the principle of which was affirmed in many decisions of this Court including *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320 (1934). There was nothing added for the purpose of driving lessors into proof of claims. Nothing was necessary. When the debt was made allowable it was discharged, *Hardy* v. *Fothergill*, 13 App. Cases 351 (1888) (House of Lords). The creditor may not stand on the formality of his invention. *In re Midland Coal, Coke and Iron Co.*, 1895, 1 Ch. 267, decided under the English reorganization statute.

NOTE No. 4.—The Bankruptcy Act, 1914, Sec. 54; The Complete Statutes of England, Vol. I, page 655.

> 54. Disclaimer of onerous property—
>
> (1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares of stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavored to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee or such extended

limited to an amount not to exceed the rent, without acceleration, for the three years next succeeding the date of the surrender of the premises to the landlord" which are immediately followed by the words "or the date of reentry of the landlord", which is an act terminating a lease as a matter of law, and which are immediately followed by the words "whichever first oc-

---

period as may be allowed by the court, disclaim the property.

* * * * * * *

(2) The disclaimer shall operate to determine, as from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3) A trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenants improvements, and other matters arising out of the tenancy, as the court thinks just.

* * * * * * *

(8) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

This comes from the 23rd section of The Bankruptcy Act of 1869 (32 & 33 Vict. C. 71 S. 23).

curs whether before or after the filing of the petition", and which are then immediately followed by the words, "plus unpaid rent accrued up to such date of surrender or reentry", the last phrase stating the rule of law as to a lessee's rent liability where a lease is terminated by an accepted surrender or reentry. The limitation stops rent, as such, with reentry or recovery of possession. It makes no distinction between processes of repossession. It creates a damage claim which survives surrender or reentry, when surrender or reentry was occasioned by a bankruptcy pending prior or reorganization.

There is a distinction between "surrender of the premises" and "surrender of the lease"; *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 35 (1926). Statutes however are given meaning by all of their clauses and the purpose they are designed to serve. Here we find that, if the trustee in the prior proceeding, or the Court, in the pending proceeding, in the interests of all, have deemed it wise to reject the lease the lessor becomes a creditor. What is the condition attending proof? It is this: "unpaid rent accrued up to such date of surrender or reentry" is the limit of his recovery of rent as such. The phrase "surrender of the premises" examined with the whole statute means nothing more than the trustee's or the debtor's act in making the premises free to the leasor's use. (Note No. 5.)

NOTE No. 5.—*In re Sherwoods, Inc.*, C. C. A. 2, 210 F. R. (1913) 754; *American Bonding Co.* v. *Pueblo Inv. Co.*, C. C. A. 8, 150 F. R. 17 (1906). In 36 *Corpus Juris*, 337, *Sec.* 1144, *note* 74, the Court will find a case cited upon this point from almost every State in the Union. The Judiciary Committees of The Congress must have known a rule of law so widely accepted.

What remains to the lessor is a claim for damage and nothing else. (Note No. 6.) Otherwise the Debtor is not released from the burden of obstructive leases. They remain in force. If so, the lessor may let the rent accumulate to the full three years limitation. Such a construction rides in the very face of the statute. The words "plus unpaid rent accrued up to such date of surrender or reentry" and the reference to injury have a place in the statutory scheme. The history of the Section in the Congress sustains this view. (Note No. 7.)

NOTE No. 6.—The distinction between claims under a lease and claims based on a breach of the lease is pointed out in *Hall* v. *Gould*, 13 N. Y. 127, 134 (1855), and *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 33 (1926). In the one case the term is still in being and the claim is for rent; in the other the term is at an end and the claim is for damages. These cases are not to be distinguished from the present on the bases of special covenant. Here the statute supplied the covenant by making the lessor a creditor and the Debtor ratified by filing a petition under the statute. That the parties had the point in mind is shown by the Morgan agreement in which the following clause was added to the rider (R. 142, fol. 216):

> "In no event shall provable claims be deemed to include any claims *for rent under the lease or for damages in respect thereof.*" (Italics supplied.)

This sentence was omitted from the rider in the case at bar (R. 62, 63, fol. 91).

NOTE No. 7.—On May 24, 1934 the bill was reported by the conferees reading thus:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under Sec.

The Congress made this provision retroactive to rejections by trustees in bankruptcy in proceedings pending prior where the prior bankrupt was willing to adopt the new section by filing a petition under it. Sec. 77B (b) (10) provides that in the event of an executory contract or unexpired lease of real estate

> "shall have been rejected by a trustee * * * in bankruptcy * * *, *in a proceeding pending prior to the institution of a proceeding under this section,* any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor." (Italics supplied.)

---

63 (a) of this Act, *in an* amount *equal to* the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of the reentry of the landlord, which ever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry * * *." (Italics supplied.)

Congress took out the word *"in an"* and substituted "but shall be limited to". It also took out *"equal to"* and substituted "not to exceed". The contrast is shown in the following where the words finally enacted are placed in brackets after the words first considered:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this act, *in an* (but shall be limited to an) amount *equal to* (not to exceed) the rent without acceleration, etc." (Compare, *Report No.* 1773, 73*rd Congress, 2d session, Cong. Rec., Vol.* 78, *Part* 9, *page* 9547, *with the statute as enacted; Appendix A. p.* 46, *of this brief.*)

The petitioner's argument is based upon the words "in a proceeding pending prior." The petitioner stands upon the statute as it is written and as it was written when the United adopted it for the purpose of obtaining its benefits. The Court below wrote these words out of the statute. The petitioner's contention for reading them as part of the statute is sustained by the situation which existed with respect to the United bankruptcy and by the legislative history of the section.

The Congress knew that by the adjudication in bankruptcy and the surrender of its assets to a trustee the Debtor had placed its assets beyond the reach of its lessors; that these assets had remained in *custodia legis* from August 29, 1932 to June 7, 1934, the day upon which Sec. 77B, became law; that these results had been obtained by a decree of a United States Court declaring the United insolvent which was still in full force and effect and citizens had acted upon the full faith and credit of the decree that the debtor was insolvent; that lessors were litigating the meaning of the existing Bankruptcy Act in the Courts and were petitioning the Congress for relief by legislation; that the Debtor and others similarly situated had gone into bankruptcy to rid themselves of leases. All of these statements are substantiated by the discussion of the proposed reorganization section as reported in *"U. S. Judiciary Committee, (House) Hearings 73rd Cong. 1-2 sess. Miscellaneous", Serial 1 page 185 et seq.* The Debtor had not been discharged in bankruptcy (R. 54, fol. 80) and the discharge alone closes the proceeding; *Watson* v. *Merrill,* C. C. A. 8, 136 F. R. 359, 363, (1905). Historically no debtor had been permitted to avoid its obligations and recapture its assets by shifting from

one imperfect insolvency proceeding to another (Note Number 8.) Finally, in order to allow reorganization the assets must be restored, and thereby the decree of insolvency and the bankruptcy vacated (Sec. 77B (i)). Surrender involves termination by a voluntary act. The Congress was not satisfied that the relinquishment had been voluntary where its condition had been the bankruptcy of a corporation. "The way they get out of that at present is they go into bankruptcy and discharge that lease." *U. S. Judiciary Committee (House) Hearings 73rd Cong. 1-2 sess. Miscellaneous, Serial 1 page* 193 and see also bottom of p. 217.

It was therefore natural and logical that the Congress should make Sec. 77B retroactive with respect to leases rejected in the bankruptcy proceeding pending prior when a prior bankrupt voluntarily adopted the section for purpose of reorganization. The United's petition is subsequent to the date of the act; *In re Nautilus Steam Shipping Company, Limited, Ex Parte Gibbs & Co.,* (1936) 1 Ch. 17, 25.

A provision was necessary with respect to those lessors who had kept their leases in force since the bankruptcy. These remained creditors of the Debtor. The Congress fully dealt with them by giving the reorganization judge authority to reject existing leases in Sec. 77B (6). This lends force to the argument that the provision in Sec. 77B (b) (10) relating to leases rejected in a proceeding pending prior could have ref-

---

NOTE No. 8.—*In re Stephenson, ex Parte The Official Receiver,* 20 Q. B. 540, 544 (1888); *The Citizen's Fire, Marine and Life Insurance Co.* v. *Wallis,* 23 Md. 173; 184 (1865); *Turner* v. *Brown,* 3 Common Bench 157, 136 Reprint 63 (1846); The Bankruptcy Act Sec. 12-(e).

erence only to the petitioner and others so situated. This is supported by the definition of a creditor as:

> "All holders of claims of whatever character against the debtor or its property, including claims under executory contracts, *whether or not such claims would otherwise constitute provable claims under this act.*" (Italics supplied.)

Finally the Congress made the entire Section retroactive by subdivision (p).

The legislative history of Sec. 77B (b) (10) is set out in an appendix at page 49. It will leave these clear cut impressions:

That the moment the section was made available to corporations adjudicated bankrupt the limitation of claims by forfeiture, reentry, or surrender, was dropped from the bill.

That simultaneously the claim was changed from rent on the lease as rent to damages for breach of the lease measured by rent.

That Congress followed the rule that what is provable is dischargeable.

That from the inception of the legislation the reorganization judge was given power to reach and reject all current leases.

That the Committees had before them the United Cigar Store bankruptcy.

The language the Congress used was legally sufficient to execute its intention. The definition of creditors as those holding claims under executory contracts "whether or not such claims otherwise would constitute provable claims under this act" was sufficient to bring prior lessors in. The definition of claims as including leases rejected in a proceeding pending prior is set out in express words. The limitation of rent as such under

the lease is unmistakable. The injury may have been incurred in "a proceeding pending prior". The language referring to leases rejected in a proceeding pending prior has meaning and a place in the statutory scheme.

A Bankruptcy Act is remedial only. Here the remedy was made retroactive, if and when adopted by a prior bankrupt, with respect to leases rejected in a proceeding pending prior. The statute does not involve the arbitrary voiding of defenses. The Congress did not compel the debtor. The statute became applicable here by the debtor's own election. If defenses were lost the debtor chose to lose them. On the debtor's side the prior bankruptcy was annulled. The United may not have the benefits of the old bankruptcy proceedings *and parts* of the reorganization section. The debtor and its stockholders are here by grace of the statute. When they appeared under the statute to claim for themselves and to contest claims they adopted the statute and its terms. The same applies to the Trustee. *Knoxville Water Company* v. *Knoxville,* 189 U. S. 434, 436, 437 (1903); *Calhoun* v. *Massie,* 253 U. S. 170, 177 (1919), which held that where a statute is adopted to obtain its benefits, the burdens go along; and *Eustis* v. *Bolles,* 146 Mass. 413, 416 (1888), which applied the rule to an insolvency proceeding. If the power were involved, the old case of *United States* v. *Pusey,* Cir. Ct. E. D. Mich., Fed. Cas. No. 16098, 27 Fed. Cas. 631; 6 N. B. R., 284 (1872), would answer. The power involves the relations of debtor and creditor.

The respondents argued below that the petitioner assumed the covenants of the lease by the agreement dated December 16, 1932. The Court below following such suggestion wrote: "leaving her both the obligor and the obligee of any such claim as she is now making". This

position is erroneous for many reasons. First there is the reservation which goes to the whole agreement. That point will be argued next. Secondly, the argument misconceives the claim as on the lease and not for damages. Thirdly, upon the rejection of a lease, as that term is used for reorganization purposes, it becomes the duty of the trustee to surrender the premises and the bankrupt lessee to give up the lease. The respondent's actual point is that by the agreement dated December 16, 1932 the parties intended to wipe out the effect of the breach and the rejection. That is flatly repelled by the reservation and the respondents' admission that claims for taxes and repairs are allowable.

IV.

THE RESERVATION IN THE EXPRESS AGREEMENT OF SURRENDER PRESERVED THE RIGHT TO PROVE, AND

SEC. 77B (b) (10) RETROACTIVELY CATCHES THE RESERVATION, AND

THE UNITED BY ITS PETITION ADOPTED ALL OF THE TERMS AND CONDITIONS OF SECTION 77B.

The reservation attached to the agreement is a part of the vital release clause. It reads:

> Fourth. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, *from any and all liability of any nature with respect to the Lease* and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, *any and all claims on the part of the Landlord in respect of rent,* or the use and occupation, if any, of the Prem-

ises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against *any and all liability of any nature with respect to the Lease* and/or any and all of said agreements of sublease, and from and against *any and all losses, claims or demands of any nature* by whomsoever made now existing or *which may hereafter arise out of or in connection with the Lease* and/or any or all of said agreements of sublease hereby assigned, or the premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store). *See rider attached hereto and made a part hereof.*

Rider.

Nothing in this Article Fourth *shall be deemed a waiver* by the Landlord *of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled* but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. (Italics supplied.)

The petitioner here did not take back her property without making a reservation. The reservation is construed as a matter of law with respect to the entire agreement. *Compiled Statutes of Nebraska,* 1929, Ch. 76, Art. 1, Sec. 109. *Miller* v. *Robertson,* 266 U. S. 243, 251 (1924); *Harrison* v. *Fartlage,* 161 U. S. 57, 63 (1896); *F. W. Woolworth Co.* v. *Petersen,* C. C. A. 10, 78 F. (2d) 47, 48 (1935); *Rich* v. *Lord,* 18 Pick. (35

Mass.) 322, 325 (1836); *In re Perkins*, 1898, 2 Ch. 182, 190 (1898); *Ford* v. *Beach*, 11 Q. B. 852, 866, 116 Eng. Reprint 693, 698 (1848).

In *Miller* v. *Robertson*, supra, it was written (p. 251 of 266 U. S.):

> "The intention of the parties is to be gathered, not from the single sentence above quoted, but from the whole instrument read in the light of the circumstances existing at the time of negotiations leading up to its execution."

This rule of law applies with special force here because the release clause, to which the reservation is attached, refers to the whole agreement and its consequences. It expressly mentions "All liability *of any nature* with respect to the lease" (R. 62, fol. 90), "All claims on the part of the landlord in respect of rent" (R. 62, fol. 90), and "All losses, claims or demands of any nature * * * *which may hereafter arise* out of or in connection with the lease" (R. 62, fol. 91). (Italics supplied.) What is reserved against the consequences is reserved against the whole. These enumerated matters cover the entire situation with which the parties were dealing in the agreement and the reservation runs against them all. (Note No. 9.) Where a

---

NOTE No. 9.—It was held below that a surrender took place in some way entirely aside from the agreement. This is error. Where there is an express surrender no implied surrender can arise; *Beall* v. *White*, 94 U. S. 382, 389 (1876), holding surrender is either express or implied; *Kottler* v. *New York Bargain House*, 242 N. Y. 28, 35 (1926), and *Klebe* v. *United States*, 263 U. S. 188, 192 (1923), holding, the courts will not imply a contract where the parties have acted by an express contract. The very nature of surrender rests in contract. Any surrender in

reservation is found it is always given effect, *William Cramp & Sons Ship and Engine Building Co.* v. *U. S.*, 216 U. S. 494, 503 (1909); *Barnett* v. *Conklin*, C. C. A. 8, 268 F. R. 177, 182 (1920); *In re Perkins* (1898), 2 Ch. 182, 190. It is all summed up in the old bankruptcy case of *Ex parte Gifford*, 6 Ves. Jun. 805, 809, 31 Eng. Reprint 1318, 1320 (1802):

> "At the time of Mr. Richard Burke's case Lord Thurlow admitted, that if there is a reserve of the remedies against the others, there is consent of the party with whom the composition is made; and if out of that a demand arises against him, it is a demand, which began to exist with his consent expressed in the terms of the contract, and under some circumstances wisely and prudently given; for the party would not have entered into the contract, unless he was allowed to contract for that remedy over against the co-sureties."

The intent of the parties may be sought in the surrounding circumstances. The legislative actions pending in the Congress under the public message of the President, the discussion extending over the entire country, were before the parties. This history is fully set out in the appendix dealing with the legislative history of Sec. 77B under nos. 1 to 7, at page 48 of this brief. The trustee in bankruptcy had sternly emphasized the point in its letter of October 6, 1932: "the

---

fact was limited by the reservation. The agreements were delivered simultaneously (R. 48, fol. 71, R. 49, fol. 73). The modification made with Frelem Realty Corporation was conditioned upon the execution of the assignment agreement and reservation with the United. (Ex. "R", R. 127, 128, fols. 194, 195, and "P", R. 122, 123, fols. 186, 187). Agreements referring to each other are construed together *Male* v. *Lafferty*, Cir. Ct. So. Dist. N. Y., 105 F. R. 564, 565 (1900).

Trustee at this early date cannot make any prediction as to the ultimate disposition of the bankrupt estate", (R. 78, 79, fols. 117, 118).

The reservation necessarily applied to legislation. The bankruptcy power is exercised by the Congress, under the Constitution, by legislative enactments. The Bankruptcy Court charts its course by the Act.

When such legislation emerged in Sec. 77B the United adopted that statute by petition. It made that section the chart on which "the Bankruptcy Court" (Sec. 77A) was "to adjudge". The reservation runs against "all liability of any nature with respect to the lease" and "all losses, claims or demands of any nature * * * which may hereafter arise out of or in connection with the lease." The Congress in Sec. 77B (b) (10) expressly referred to a lease "rejected by a trustee * * * in bankruptcy * * * in a proceeding pending prior."

The first part of the reservation: "Nothing in this Article Fourth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled" is its essence. The parties realizing the sweeping clauses to which it was directed recognized it as necessarily sweeping in its scope, because they immediately attached limitations. But these all go to the point of a well founded claim, (*Lesser* v. *Gray,* 236 U. S. 70, 74 (1914)), allowable as a debt otherwise than by the reservation. The United has now supplied the "otherwise" by adopting Sec. 77B. The range of choice as to a remedy is the remedies available at the moment the right is asserted; *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 271 (1921). This is especially so where "all claims * * * which may hereafter arise" have been reserved.

The court below held in the case at bar that the claim was within the reservation. It wrote that it was "excepted by the rider from the release given" (R. 182, fol. 287). It did not modify that position in the case at bar upon denying the motion for reargument (R. 185, fol. 304).

The respondents may not stand in the case at bar upon release by construction. The repairs were admittedly an allowable claim in the bankruptcy pending prior (R. 75, fol. 111) and the taxes in the present proceeding (R. 36, fol. 56). Thus claims survived the agreement into the bankruptcy proceedings and into these proceedings. Upon these admissions, the document was not, in any event, a release, it did not extinguish the debt; it was a covenant not to sue. (Note No. 10). A claim upon the covenant to build, and the taxes was duly filed in the bankruptcy proceedings, (R. 133, fol. 203). The United admits that it removed its assets, described in the reservation as "the bankrupt estate", from the bankruptcy proceedings (R. 54, 55, fols. 79, 80), while petitioner was prosecuting the claim (R. 52, fol. 76). The United breached the covenant, even

---

NOTE No. 10.—Release extinguishes the debt. Keilway, p. 89-2 and p. 90-8 (22 Hen. 7); 72 Eng. Reprint 251, 252: "Nota que Fineux chiefe Justice dit * * * mes son release va en mere extinguishment."

The rule is applied to bankruptcy in *Bateson* v. *Gosling*, L. R. 7, Common Pleas, 9, 16, 17 (1871).

The distinction between a release and a covenant not to sue is made in: *Garnett* v. *Macon*, Fed. Cas., 5245, 2 Brock. 185, 10 Fed. Cases 12, 24, Cir. Ct. East Dist. of Va. (1825), (Marshall, J.); *Barnett* v. *Conklin*, C. C. A. 8, 268 F. R. 177, 182 (1920); *The Thomas P. Beal*, 298 F. R. 121, 122 (1924). *Jackson* v. *Stackhouse*, 1 Cowan, 122 (1823), *Williston, Contracts*, Sec. 1823.

in its own narrow interpretation of it, and may not stand on it. (Note No. 11).

Parol evidence may not be brought into the case at bar to sustain respondents' attempt at release by construction. Cases based on parol evidence, admitted by consent, or inadvertence, have no authority here. This was long ago established in bankruptcy. *Re Moon; Ex parte Dawes,* (Ct. of App.), 55 Law Times 114, Appeal from Queen's Bench Division in Bankruptcy, Lindley, L. J., p. 120; (1886)

> "Now, we have not to consider any question of rectification. If we were considering that, of course we should have to let in and consider a body of evidence which, on the question of construction, is not admissible at all."

WHEREFORE the petitioner respectfully asks that the Court reverse the orders below and remand the cause to the District Court with a direction that the claim be allowed and that in liquidating the item for breach of the covenant to build, the damages be the cost of construction as declared by the State court; and that the damages for the item for breach of the lease be the actual damages sustained not exceeding the rent for three years reserved in the lease.

PERLIE P. FALLON,
Counsel.

December, 1936.

NOTE No. 11.—*Ranson* v. *Geer,* 20 Blatchford, 535, 537, So. Dist. of N. Y. (1882); *In re A. B. Carton & Co.,* 148 Fed. Rep. 63, 66 (1906); *Shubert* v. *Rosenberger,* C. C. A. 8, 204 Fed. Rep. 934, 938 (1913); *Clark* v. *Bowen,* 63 U. S. (22 Howard) 270, 273 (1859); *Memphis* v. *Brown,* 20 Wall 289, 308 (1873); *Turner* v. *Brown,* L. R. 3 Common Bench, 157; 136 Eng. Reprint 63 (1846).

St. Louis I. M. & S. Ry. Co. v. *Clark,* C. C. A. 8, 51 Fed. Rep. 483, 486 (1892);" * * * but when the railway company subsequently changed the situation * * * it thereby revived the claim on behalf of complainants."

APPENDIX A.

The Statutes.

(1) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 563, as amended June 7, 1934, C. 424, 48 Stat. 912; as amended Aug. 20, 1935, C. 577, 49 Stat. 664; Aug. 29, 1935, C. 809, 49 Stat. 965:

"SEC. 77A. *Additional Jurisdiction.*—In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act." (U. S. C. App., Title 11, Sec. 206.)

"SEC. 77B * * * (b) * * * (10) * * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord,

whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after this amendatory Act takes effect a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (p) This section shall take effect and be in force from and after the date of the approval of this amendatory Act and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may

be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act." (U. S. C. App., Title 11, Sec. 207.)

(2) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 562:

"SEC. 12 (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." (U. S. C., Title 11, Sec. 30.)

"SEC. 63. *Debts which may be proved.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." (U. S. C., Title 11, Sec. 103.)

(3) Compiled Statutes of Nebraska, 1929, Ch. 76, Art. 1, Sec. 109:

"76-109. *Construction of Instruments, Duty of Courts.*—In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law."

APPENDIX B.

The Legislative History of Sec. 77B.

(1) A revision of the Bankruptcy Act and the addition of a section permitting corporate reorganization was recommended to the Congress by the President as early as February 29, 1932. An exhaustive report covering the administration and the history of bankruptcy legislation in the United States, Great Britain and Canada, prepared by the Attorney General, accompanied the message. (*Cong. Rec. vol.* 75, *Part* 5, *pages* 4920 *to* 4922.) The United filed its petition in bankruptcy August 29, 1932 (R. 54, fol. 80).

(2) It was directed that the report be printed (*Senate Doc.* 65, 72*d Cong.* 1*st Sess.*) because the subject was being discussed in all the bar associations of the states (p. 4922). A bill which the Attorney General had drafted was introduced in the Senate by Senator Hastings (S. 3866) and referred to the Committee on Judiciary (*Cong. Rec. Vol.* 75, *Part* 5, *p.* 4907). It was also introduced in the House by Mr. Michener (H. R. 9968) and referred to the same Committee of the House (*ubi supra* p. 5059). The bill provided a new section "76" providing a means of corporate reorganization (*Sen. Doc.* 65, *p.* 91, *footnote* 72) which made leases provable debts by suspending the provisions of Sec. 63 (a) unless an order was made to liquidate the estate.

(3) The Senate Judiciary Committee and the joint sub-committees of the Judiciary of both Houses held public hearings at which 1091 pages of testimony were taken. Chambers of Commerce, Bar associations, and individuals from all over the country were heard with respect to the bill. (*U. S. Judiciary Committee* (*Senate*) *Hearings,* 72*nd Cong.* 1*st Session. Uniform System of Bankruptcy, Parts* 1 *to* 4.) This testimony was taken in April, May, and June of 1932.

(4) At the hearings the section covering corporate reorganization was discussed.

(5) The evidence before the Committees showed that the courts, because of a common law distinction, were compelled to treat leases differently than other executory contracts of a bankrupt and that the extent and application of the distinction was not clearly fixed (page 978).

(6) The testimony shows that the rules with respect to forfeiture and reentry were before the Committees.

(7) The Committees which took this testimony included Senator Hastings and Representative McKeown who subsequently led the discussion of Sec. 77B in their respective Houses and acted as conferees in the adjustment of differences respecting proposed amendments. S. 3866 and H. R. 9968 died with the adjournment of the first session of the 72nd Congress. Mr. Sumners introduced in the second session H. R. 14359 which added four sections 73, 74 (individuals) 75 (corporate reorganization), 76 (reorganization of railroads) (*Cong. Rec. vol.* 76, *Part* 2, *Page* 2242). It passed the House January 30, 1933 (*Cong. Rec. Vol.* 76, *Part* 3, *pages* 2902 *to* 2931). In the Senate a section was added relating to farmers and the section respecting corporate reorganization was struck out because only a few days remained in the session. (*Cong. Rec. Vol.* 76, *Part* 5, *pages* 4876, 5104, 5129, 5135.) In the 73rd Congress, 1st session, Mr. McKeown introduced H. R. 5009 dealing with corporate reorganization (*Cong. Rec. Vol.* 77, *Part* 2, *page* 1778). Hearings were held before the House Judiciary Committee; (*U. S. Judiciary Committee, (House) 73rd Cong. 1-2 sess. Miscellaneous*). The bill was not reported. Mr. McKeown then introduced H. R. 5884 which passed the House, (*Cong. Rec. Vol.* 77, *Part* 5, *Page* 5009) was debated and amended by the Senate (*Cong. Rec. Vol.* 78, *Part* 7, *Pages* 7746, 7885, 7889, 8054), was sent to Conference (pp. 8151, 8351), was recommitted to the conference (p. 9760), and the final report adopted by the House (p. 9897, 9899) and Senate (p. 10208) and became law as Sec. 77B.

(8) The legislators were aware of the rule of the bankruptcy law that a claim which is made provable is thereby made dischargeable. In a debate in the Senate on amendments with respect to leases Senator Hastings said that the rent claims were in there without any amendment:

> "because we have undertaken in these sections to include all the claims that could be made against a debtor, so that when he got relief he might know that he had relief against every kind of a claim that might be had against him." (*Cong. Rec. Vol.* 76, *part* 5, page 4906.)

Senator Hastings was referring to (b) (6) which gives the reorganization judge power to reject leases. Such a provision was in the legislation from the beginning. When it first appears in the corporate reorganization section, it has, in addition to the present language giving the judge power to reject executory contracts including unexpired leases, the following words "unless the same shall have been previously rejected with the approval of the judge." (*U. S. Judiciary Committee (House) Hearings, 73rd Cong. 1-2 Sess. Miscellaneous p. 192, bottom.*) Later this reference to leases previously rejected was taken out of (b) (6) and inserted in the definition of claims and in the words now found in (b) (10) "or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section." Mr. McKeown explained that provision of the reorganization section to the Committee of the House as follows:

> "That attempts to bring in and provides for the approval and settlement of claims that otherwise would not be liquidated claims. For instance take one of these cigar-store chains and it has a 99 year lease on some nice corner piece of property and that lease is unexpired: The way they get out of that at present is they go into bankruptcy and discharge that lease. Under this, the fellow has a

chance to come in and get approval of a claim for an executory contract." (*U. S. Judiciary Committee (House) Hearings, 73d Cong. 1-2 sess. Miscellaneous, Serial 1, p. 193.*)

(9) Simultaneously with the amendment of the proposed legislation making it available to corporations *already adjudicated bankrupt* all limitation of lease claims by reference to surrender or forfeiture was dropped from the proposed bill. When H. R. 5884 (the final bill) came to the Senate for debate Senator Hastings first offered an amendment to subdivision (a) which defines corporations which may take advantage of the section. His amendment provided that corporations already adjudicated bankrupt might file a petition. The amendment was enacted. (*Cong. Rec. Vol. 78, Part 7, pages 7888, 7889.*) He then moved that the words "for future rent" be struck out of the definition of creditors in (b) (10) and the amendment was adopted (*ubi supra* p. 7889). He then had read the provision of (b) (10) with respect to leases as it had been enacted in the House. It was as follows:

"In case any executory contract shall be rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach, and such claim may be allowed, *provided such contract shall not have been terminated by forfeiture, reentry or otherwise.*" (Italics supplied.)

He moved that this be amended to read as follows: (p. 7889)

"In case any executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, *or shall have been rejected by a trustee in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section,* any person injured

by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation be deemed to be a creditor to the extent of the injury resulting from such rejection: * * * ".

The amendment was adopted (*ubi supra* page 7889). Mr. Cellar's questions, at the hearing before the House Committee, which immediately follow Mr. McKeown's explanation mentioned above, make the purpose clear:

> Mr. Cellar: Was there not some provision in the bankruptcy bill referring to debtors concerning *unproved rents or leases* which might be provable claims in bankruptcy?
>
> Mr. McKeown: That was in the bill that went through before—similar language.
>
> Mr. Cellar: Is this language sufficient to cover the objections to the other language?
>
> Mr. McKeown: Yes sir. (*U. S. Judiciary Committee (House) Hearings, 73d Cong. 1-2 sess. Miscellaneous, Serial* 1, *p.* 193.)

There is a clear legislative purpose to reach and give relief to lessors in the existing bankruptcies. Some members of the House Judiciary Committee thought as Mr. Cellar indicated by his question that they had reached it by the last sentence of Sec. 74(a) (47 Stat. 1467). When they learned that the judges of the Federal courts in New York City were rejecting it as applying to individual bankrupts only, they took testimony and devised other amendments (*U. S. Jud. Comm. (House) Hearings, 73d Cong.* 1-2 *sess. Miscellaneous, Serial* 1, *pages* 199, 216 (*bottom*) 217 *et seq.*). They not only clarified their position by making a separate amendment to Sec. 63(a) but Mr. McKeown's and Mr. Cellar's remarks bring out that the "unproved" leases were in their contemplation in the corporate reorganization section.

(10) When H. R. 14359 was presented to the House it contained a section identical with the present retro-

active subdivision (p). Attention was at once directed to it:

> "Mr. Eaton of Colorado: My question concerns the last amendment which would attempt to make the bankruptcy statute immediately applicable to pending cases. Is that correct?
>
> Mr. Sumner of Texas: Yes; with some qualifications I believe." (*Cong. Rec. Vol.* 76, *Part* 3, *page* 2909.)

In the hearings before the House Committee Mr. Cellar by his questions made the point directly and the sequence of Senator Hastings amendments is unmistakable.

(11) The legislators had in mind the distinction between defining a creditor and defining a claim and put the reference to leases rejected in proceedings pending prior in that part of subdivision (b) (10) defining claims. When several of the new sections, including corporate reorganization, were before the Senate in debate the point was made in discussing the section relating to farmers. Senator Bratton offered as an amendment to the clause defining creditors the following:

> "All holders of claims of whatever character against the debtor or his property, *including future rent.*" (Italics supplied.) (P. 4905.)

Also the following amendment:

> "A claim for future rent shall constitute a provable debt, and shall be liquidated under Section 63 of the act." (*Cong. Rec. Vol.* 76, *Part* 5, *page* 4906.)

Senator Hastings said these were unnecessary because they were already covered by the definition of a creditor. Senator Bratton said that section only defined the holder of a claim and Senator Hastings agreed but asked if these amendments would not affect rents under the old law and Senator Bratton said they would.

(*Cong. Rec. Vol.* 76, *Part* 5, *Page* 4906.) *When the debate was resumed on a later day Senator Bratton pressed the amendments and Senator Hastings accepted them, stating they amended the Bankruptcy Act generally, and they were enacted by the Senate.* (*Cong. Rec. Vol.* 76, *Part* 5, *page* 5135, *bottom at left.*)

(12) The provisions of Sec. 77(b) (10) developed in the legislation from a claim for future rent into a claim for damages based upon the termination of a lease. This has been pointed out in note on page 32, and quotations from the conference report set out there.

(13) The legislators considered the English bankruptcy statutes. On January 30, 1933, Mr. Hogg read to the House the English Scheme of Arrangements Act citing it as Vol. 2, English Statutes, 1867 page 1332. (*Cong. Rec. Vol.* 76, *Part* 3, *page* 2940.)